

## High Court of Ireland Decisions

Mullins v. Harnett [1998] IEHC 207; [1998] 4 IR 426;  
[1998] 2 ILRM 304 (1st April, 1998)

### High Court

### Mullins v District Judge Harnett and others

**1997/346 JR**

**1 April 1998**

O'HIGGINS J:

This case comes before the Court on foot of an Order granting the Applicant leave to apply by way of application for Judicial Review for an injunction restraining the Director of Public Prosecutions from continuing the prosecution of a case against the Applicant.

The Applicant was charged with assault "contrary to common law and Section 42 of the Offences Against the Person Act, 1861 as amended by Section 11 of the Criminal Justice Act, 1951 as amended by Section 10 of the Criminal Justice (Public Order) Act, 1994."

By virtue of Section 8(1) of the Non-Fatal Offences Against the Person Act, 1997, which came into effect on the 19 August, 1997, the common law offence of assault is abolished. The date of the alleged commission of the offence the subject matter of this case, was the 24 May 1997. The date for the hearing of the Summons was the 2 September 1997.

The point at issue is as follows: Do the provisions of the Non-Fatal Offences Against the Person Act operate retrospectively?

Mr Grogan, for the Applicant, argues that since (a) the crime of assault contrary to common law was abolished on the 19 August, 1997 and (b) there was no saving for offences charged prior to that date, (either in the provisions of the Act, or by virtue of the Interpretation Act, 1937), after the 19 August no such offence could be prosecuted. While conceding that point had been considered in detail in the recent case of *Quinlivan and The Governor of Portlaoise Prison and Others* (Judgment of McGuinness J delivered 9 December, 1997) which is of persuasive authority, Counsel for the Applicant argued that the decision in that case was incorrect.

The Interpretation Act

The Interpretation Act of 1937 deals with a situation where an Act of the Oireachtas repeals in whole or in part the provisions of a previous statute. The relevant provisions are as follows in Section 21(1)

(c) "where an Act of the Oireachtas repeals the whole or portion of a previous statute, then, unless the contrary intention appears, such repeal shall not . . .

(d) effect any penalty, forfeiture, or punishment, incurred in respect of any offence against or contravention of the statute or portion of statute so repealed which was committed before such repeal, or

(e) prejudice or effect any legal proceedings, civil or criminal, pending at the time of such repeal in respect of any such right, privilege, obligation, liability, offence, or contravention as aforesaid."

Counsel for the Applicant contends that the 'saving' provisions of the Interpretation Act do not apply, as the Non-Fatal Offence Against the Person Act, 1997, repeals, not a portion of a previous statute, but a common law offence.

Counsel for The Director of Public Prosecutions, however, takes issue with this contention and says that the provisions of the Interpretation Act do apply in the following circumstances:-

By Section 31 of the Non-Fatal Offences Against the Person Act, 1997:-

"each enactment specified in column 2 of the Schedule to the Act is hereby repealed to the extent specified in column 3 of the Schedule."

The Schedule to the Non-Fatal Against the Person Act repeals Section 42 of the Offences Against the Person Act and Section 11 of the Criminal Justice Act, 1951. It is contended that, since those sections are part of previous statutes repealed by an Act of the Oireachtas, they are covered by the relevant "saving" provisions of the Interpretation Act, 1937.

In my view, however, the offence of common assault is clearly a common law Offence. Section 42 of the Offences Against the Person Act, 1861, merely provides a penalty as does Section 10 of the Criminal Justice Act, 1951 as amended by Section 10 of the Criminal Justice (Public Order) Act, 1994. It is not a "hybrid" of offence similar to Section 47 of the Offences Against the Person Act, 1861, which does create a statutory Offence in a similar offence of common law, and was dealt with in the case *The State (o) v O'Brien* [1971] IR 42. I am strengthened in my view, by both the decision of the Special Criminal Court in *The People v Kayanagh* delivered by Mr Justice Barr on the 29 October, 1997 and by the *Quinlivan Case* where Mrs Justice McGuinness came to the same conclusion. It is a pre-requisite for the saving provisions of Section 21(1)d of the Interpretation Act to be applied that the whole or part of a previous statutory provision be repealed. In the present case since "a statute or part of it was not repealed by the abolition of the offence of assault by Section 28 of the Non-Fatal Offences Against the Person Act, 1997, the Respondent cannot avail of the provisions of the Interpretation Act.

#### Construction and Interpretation

The following seem to me to be the principles and canons of construction and interpretation to be applied to the Act:-

Presumption against retrospection.

2. "Public good" construction.
3. The "common sense" rule of construction.
4. Rules of construction of transitional provision.
5. The principle of not adding words to a statute.
6. The principle against doubtful penalisation.
7. The "so called" principle of strict interpretation of penal statutes.

I propose to deal with these matters seriatim.

1. "Presumption Against Retrospection"

This principle was discussed in the judgment of Mrs Justice McGuinness in the Quinlivan case, and a number of cases were cited including Gloucester Union v Woolwich Union [1917] 2 KB 374; Attorney General v Marquess of Hartford (1849) 3 Exch 670; Hitchcock v Way (1837) 6 Ad and El 943; in re McLoughlin's application [1963] IR 465. R (O'Leary) v Justices of Kerry 3 NIJR 251; in re Athlumney [1898] 2 QB 551, and Hamilton v Hamilton [1982] IR 466 and 1982 ILRM at page 290.

The principle was stated in the judgment of Henchy J in the Hamilton case 92IR page 466 at page 480 and 481 as follows:-

"from a wide range of judicial decisions I find the relevant canon of interpretation at Common Law to be this. When an Act changes the substantive, as distinct from procedural law then, regardless of whether the act is otherwise prospective or retrospective in its operation, it is not to be deemed to effect proceedings brought under the pre-Act Law and pending at the date of the coming into operation of the Act, unless the Act expressly or by necessary intendment provides to the contrary".

Henchy J also says as follows:-

"Maxwell on the interpretation of statutes, (12 Ed, pp 220-1), puts the applicable rule of interpretation thus:-

'In general when the substantive law is altered during the pendency of an action, the rights of the parties are decided according to the Law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights'.

I would cavil at that statement of law to the extent that the rule of interpretation sets out is stated to be only a general one, thereby suggesting that it admits of exceptions. In my opinion, the judicial authorities show that it is a universal rule which applies to all pending actions, unless the language used in the enactment is susceptible of no other conclusion than that the rights of the parties to pending action are intended to be effected".

In the same judgment at page 484 Henchy J continues:-

"The judicial authorities (which are mentioned in the judgment which the Chief Justice has just delivered) make clear that, because there is a presumption that a statute does not intend to operate unfairly, unjustly or oppressively by trenching on rights or obligations lawfully acquired or created before the statute came into force, it should be construed as prospective in its application and not retrospective, unless there is a clear and unambiguous intention to the contrary expressed, or necessarily implied in the statute, or unless the change affected by the statute is purely procedural".

## 2. "Public Good Construction "

In Bennion Statutory Interpretation 2 Ed at page 217 the author defines this as follows:-

"One of the principles governing statutory interpretation is that the construction adopted should serve the public interest. This criterion, like many others, can effect the question of whether an enactment should be given a retrospective construction".

Counsel for the Respondent argues that it would be contrary to the public interest that immunity should be granted to all of those who were charged either with the offence of assault contrary to common law, assault occasioning actual bodily harm, kidnapping, and false imprisonment (all of which offences were abolished by Section 28(1) of the Non-Fatal Offences Against The Person Act, 1997) regardless of the circumstances of the commission of those offences.

## 3. "Common Sense Rule"

I was referred by Counsel (as indeed was Mrs Justice McGuinness in the Quinlivan case) to the following passage in the Bennion's book at page 407:-

"It is a rule of Law. . . that when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, the Court should presume that the legislator intended common sense to be used in construing the enactment".

The argument on behalf of the DPP and indeed the Notice Party goes as follows:-

A certain set of facts constituted the criminal offence of common assault prior to the Non-Fatal Offences Against The Person Act, 1997. The Oireachtas made the same set of facts constitute another offence on the coming into force of the Act. Given those circumstances (the contention is) that it defies common sense that the Oireachtas intended to give immunity to those already charged with offences arising out of a set of facts which, both before and after the enactment, constituted a criminal offence.

## 4. "Rules of Construction of Transitional Provision"

In the Quinlivan case Mrs Justice McGuinness referred to Bennions work at page 213), where he refers to the position of transitional provisions in an enactment as follows:-

"Where an Act contains substantive, amending or repealing enactments, it commonly also includes transitional provisions which regulate the coming into operation of those enactments and modify their effect during the period of transition. Where the Act fails to include such provisions

expressly, the Court is required to draw such inferences as to the intended transitional arrangements, as in the light of the interpretative criteria, it considers Parliament to have intended".

At page 26 of her judgment Mrs Justice McGuinness said:-

However, I would accept that, as stated above, where the Act fails to include transitional provisions, the Court has a duty to draw such inferences as to the intended transitional arrangements as it considers Parliament to have intended."

Counsel for the Applicant does not dispute the existence of principles 1-4 above. nor does he seriously dispute the observations made on those principles by the Respondent. He submits, however, that those principles do not apply in criminal cases. It is "of the core" of his submission that "somewhat different principles arise to criminal cases" and he relies on (5) the principle of not adding words to a statute (which is not confined to penal measures), (6) the principle against doubtful penalisation, and (7) the so-called principle of strict construction of penal statutes.

5"Principle Against Adding Words to a Statute"

This principle is stated by Maxwell at page 33 as follows:-

"It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express".

The Applicant says that the legislator failed to express the continuation of offences already charged, when it could have done so, and that no words should be added. However, what is sought in this case is not to add to or take from the words of the statute but to interpret the statute in the absence of words. If I am wrong in that, however, I still must have regard to the fact that the provisions are transitional, in deciding whether there are adequate grounds to justify the inference that the legislature intended something which it omitted to express.

6. "The Principle Against Doubtfull Penalisation" and

7. The so-called "Principle of Strict Construction of Penal Statutes

It appears to me that the latter two canons of construction, which apply to penal statutes, are in addition to, and not in substitution for, other canons of construction. Penal statutes are not only criminal statutes, but any statutes that impose a detriment. In addition to the application of the principles set out above in 1-5, the latter two principles also apply.

6. The Principle Against Doubtful Penalisation

According to this principle nobody suffers a detriment by the application of a doubtful law. By virtue of that concept a construction of a statute is of necessity doubtful if it imposes ex-post facto law. The matter is specifically dealt with by Article 15(5) of the Constitution which says "the Oircheatas shall not declare Acts to be infringements of the law which were not so at the date of their commission."

According to Maxwell 12 Ed pp 23 9-240 "the strict construction of a penal statute seems to manifest itself in four ways: in the requirement of express language for the creation of an offence;

in interpreting strictly the words setting out elements of an offence; in requiring the fulfilment of the letter of the statutory conditions precedent to the infliction of punishment; and in insisting on a strict observance of technical provisions concerning criminal procedure and jurisdiction". It would appear that the principle applies not only to criminal offences but to any form of detriment. At page 572 of Bennion the nature of the principle is stated thus: "whenever it can be argued that an enactment has a meaning requiring the infliction of a detriment of any kind, the principle against doubtful penalisation comes into play. If the detriment is minor, the principle will carry little weight. If the detriment is severe, the principle will be correspondingly powerful. As Staughton LJ said in relation to penalisation through retrospection, "it is a matter of degree -- the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended'. However it operates, the principle requires that that person should not be subjected by law to any sort of detriment unless this is imposed by clear words." In the present case, it is doubtful to see how any "unfairness" could be contended for by the Applicant, and unfairness could be contended for by the Respondents. It seems, moreover that the principle, is largely, if not entirely concerned with the creation of ex post facto law, and is bound up with the seventh canon of construction, namely, the so-called principle of strict construction.

#### 7. "The so-called principle of strict interpretation of penal statutes"

At page 382 of the 2nd Edition of Bennion the principle is explained as follows:-

"The true principle has never been that a penal statute must be construed strictly, (though it is often stated in such terms). The correct formulation is that a penal statute must be construed with due regard to the principle against doubtful penalisation, along with all relevant criteria." (my underlining)

The following passage occurs at page 246 of the twelfth edition of Maxwell concerning this canon of construction:-

"The effect of the strict rule of construction might be summed up by saying that, where the equivocal word or ambiguous sentence leaves a reasonable doubt which the canons of interpretation fail to solve (my underlining), the benefit of the doubt should be given to the subject against the legislature which has failed to explain itself. If there is no ambiguity and the act or omission in question fails clearly within the mischief of the statute, the construction of the penal statute differs little if at all from that of any other."

In the case of *Bowers v Gloucester Corporation* [1963] 1 QB 881 at page 886/87 Lord Parker CJ stated:-

"A provision can only be said to be ambiguous, in the sense that if it be a penal section it would be resolved in a manner most favourable to the citizen, where having applied all the canons of interpretation (my underlining) the matter is still left in doubt." It seems to me, therefore, that in construing penal (not only criminal) statutes the same principles apply as to other statutes, but additional criteria have to be taken into account also. Having applied "all the canons of interpretation" the matter does not appear to me to be ambiguous (in the sense that, being a penal section, it would be resolved in a manner most favourable to the citizen). In my judgment, taking all the factors outlined above into consideration, the Respondent has established to my satisfaction that the offence of assault contrary to common law was not abolished for pre-existing charges by the enactment of Section 28 of the Non-Fatal Offences Against the Person Act, 1997.

"It is clear from our jurisprudence that that Courts should not engage in the question of the

possible invalidity of an act of the Oireachtas unless it is necessary for its decision to do so" (per Finlay CJ in *McDaid v Sheehy* [1991] 1 IR 1 at p 17).

In view of the fact that I have arrived at a decision based on the canons of interpretation and the case law, it is unnecessary for me to examine the constitutional position. and, in the light of the decision in *McDaid & Sheehy*, it would not be appropriate for me to do so.